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GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

v.

THAI-LAO LIGNITE CO LTD & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D-24NCC(ARB)-7-2010]
15 APRIL 2011

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ARBITRATION: *Award - Setting aside - Time limit - Application made nine months after award delivered - Whether court had power to grant extension of time - Whether delay was inordinate - Whether court considered merits in application - Arbitration Act 2005, s. 37(1), (4)*

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The plaintiff and the defendants commenced arbitration proceedings in Kuala Lumpur. Nine months after the award was issued and delivered, the plaintiff commenced this action by way of originating summons ('encl. 1) seeking, *inter alia*, that the time limited under s. 37(4) of the Arbitration Act 2005 ('AA 2005') be extended to enable the plaintiff to

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file an application under s. 37(1) to set aside the arbitration award. However, the defendants applied to set aside the service of the originating process. The issues for the determination of the court were: (i) whether the court had power to grant an extension of time to set aside the award pursuant to s. 37(4) of AA 2005 or under its inherent

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jurisdiction; and (ii) whether the court ought to exercise its discretion in the plaintiff's favour.

Held (dismissing encl. 1 with no order as to costs):

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(1) It is trite that the AA 2005 has *prima facie* accepted the UNCITRAL Model Law and the judicial sentiment here as well as other countries which have adopted the same is inclined towards the jurisprudence relating to "minimum intervention of the court" in matters governed by the Act. (para 13)

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(2) Section 37(4) of the AA 2005 is directory and not mandatory, in a limited sense only. In the instant case, there was a nine-month delay and the grounds stated, *prima facie*, did not warrant the court to condone delay. The delay here was not "just delay" but was inordinate delay as the plaintiff had adequate legal representation. (para 15)

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(3) The substantive merit of the application to set aside the award could not be *sine qua non* to consider an application to condone delay relating to the AA 2005 where parties have agreed to arbitration proceedings voluntarily, submitted to the jurisdiction, represented by counsels and have received the award from the tribunal, but failed to file the application within time. (para 16)

Case(s) referred to:
ABC Co v. XYZ Co Ltd [2003] 3 SLR 546 ***(refd)***
Bulk Transport Corporation v. Sissy Steamship Co Ltd [1979] 2 Lloyd's (Rep) 289 ***(refd)***
Chip Lam Seng Berhad v. R1 International Pte Ltd [2010] 1 LNS 64 HC ***(refd)***
Downer-Hill Joint Venture v. Government of Fiji [2005] 1 NZLR 554 ***(refd)***
Genuine Paints & Chemicals Co. v. Union of India 73 [1998] DLT 296 ***(refd)***
Ismail v. The Polish Ocean Lines [1977] 2 Lloyd's Rep 134 ***(refd)***
Kalmneft JSC v. Glencore International AG and Another [2002] 1 All ER ***(refd)***
Kemira Sdn Bhd v. Weldone (Sarawak) Sdn Bhd [2007] 1 LNS 532 HC ***(refd)***
Kwan Lee Construction Co Ltd v. Elevator Parts Engineering Co Ltd [1997] 1 HKC 97 ***(refd)***
Percon Corp Sdn Bhd v. Yap Choon Loy [1998] 3 CLJ 423 CA ***(refd)***
State of Haryana v. Chandra Mani AIR 1996 SC 1623 ***(refd)***
Sundra Rajoo v. Mohamed Abd Majed & Anor [2011] 6 CLJ 923 HC ***(refd)***
Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***
The Government Of India v. Cairn Energy India Pty Ltd & Anor [2012] 3 CLJ 423 FC ***(refd)***
Thomas v. Booty, Edwards & Partners [1964] 1 LNS 207 FC ***(refd)***
Union of India v. Popular Construction Co AIR 2001 SC 4010 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 37(1), (4), 42(1), (2)
Rules of the High Court 1980, O. 14A

For the plaintiff - Shanti Morgan; M/s Shearn Delamore & Co
For the defendants - Sunil Abraham; M/s Zul Rafique & Partners

Reported by Amutha Suppayah

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the plaintiff's originating summons (encl. 1) where the prayer reads as follows:

(1) An extension of time be granted and the time limited under the Rules of the High Court 1980 be extended to enable the plaintiff to file an application under s. 24(2) of the Arbitration Act 1952 to set aside the Arbitration Award dated 4 November 2009 in this action against the defendants;

A (2) In the alternative, an extension of time be granted that the time limited under s. 37(4) of the Arbitration Act 2005 be extended to enable the plaintiff to file an application under s. 37(1), and particularly s. 37(1)(iv), 37(1)(a)(v) and s. (1)(a)(3) of the Arbitration Act 2005 to set aside the Arbitration Award dated 4 November 2009 in this action against the defendants;

B (3) Subsequent to the prayer (1) or (2) above, the filing and commencement of the proceedings to set aside the Arbitration Award dated 4.11.2009 be considered good and in order;

(4) That the Arbitration Award made by three arbitrators in Kuala
C Lumpur dated 4 November 2009 to be set aside;

(5) That the cost of this application to be borne by the defendants;

(6) Such other relief or further order as this Honourable Court may deem just and appropriate.

D **[2]** The central issue in this judgment is whether an application to set aside an arbitral award made pursuant to the Arbitration Act 2005 ('AA 2005') can be entertained when the application is made after the expiry of 90 days from the date of receipt of the award. Section 37(4) of the AA 2005 reads as follows:

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> An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under s. 35, from the date on which that request had been disposed of by the arbitral tribunal.

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Brief Facts

[3] The plaintiff and the defendants commenced arbitration proceedings in Kuala Lumpur and the law governing the arbitration as agreed was
G New York and the seat of the arbitration was Kuala Lumpur. The parties were represented by counsels who were conversant with the local laws as well. The award was issued and delivered to the plaintiff on 4 November 2009.

[4] The plaintiff had filed this application nine months after having
H received the award and is also seeking a prayer to condone the delay. The plaintiff has obtained leave of the court to serve the originating process outside jurisdiction and had served on the defendants. The defendants have obtained leave to file a conditional appearance and have filed an application (encl. 10) to set aside the service of the originating
I process.

[5] When encl. 10 came for hearing, I took the view that for just, expeditious and economical disposal of the case, I should exercise my discretion pursuant to order O. 14A of the Rules of the High Court

1980 to ascertain whether, on the *prima facie* grounds stated by the plaintiff to seek extension of time, the court will be minded to extend time when dealing with s. 37(4) of the AA 2005.

[6] It must be noted here that courts in other jurisdictions had also indicated that the issue in respect of delay must be decided first before the relief is considered. For example in the New Zealand case of *Downer-Hill Joint Venture v. Government of Fiji* [2005] 1 NZLR 554, the court made the following observations:

> As mentioned, the second strike out ground alleges that some of the grounds in Downer's application to set aside are time-barred. If or in so far as that is so, it will be unnecessary to determine whether those grounds disclose a reasonable cause of action. The second strike out ground thus logically precedes the first, and we therefore turn now to deal with that.

[7] I invited the plaintiff to address the court on the issue and with liberty to the learned counsel for the defendants to assist court. The learned counsel for the defendants had indicated to the court that they have instructions not to participate at this stage of the proceedings. The position of the defendants is understandable as they have only obtained conditional appearance and ought not to participate in any arguments relating to the merit of the originating process itself.

Whether The Delay Can Be Condoned?

[8] The learned counsel for the plaintiff has summarised the grounds in support of its application *inter alia* as follows:

(i) Plaintiff is a foreign sovereign and the award is in excess of US $56 million.

(ii) The award is in excess of jurisdiction.

(iii) This is an international arbitration where the plaintiff was not conversant with local law requirements and did not receive adequate advice from its legal advisers such as to enable the application to be made within time in Malaysia. Instead the plaintiff's time, efforts and resource were expended fighting enforcement applications in various jurisdictions.

(iv) The defendants will not be prejudiced. The plaintiff will be.

[9] The issues for the determination of the court are as follows:

(i) Whether the court has power to grant an extension of time to set aside the award pursuant to s. 37(4) of the AA 2005 and/or any other law/its inherent jurisdiction.

A (ii) Is this a case where the court ought to exercise its discretion in the plaintiff's favour.

[10] The submissions of learned counsel can be summarised as follows:

B (i) Section 37(4) of the AA 2005 provides that an application to set aside an award **may** not be made after expiry of ninety days from the date on which the party making the application had received the award. The provision is directory not mandatory with the use of the term "may" enabling this court to exercise its discretion in C granting an extension of time.

(ii) Within the AA 2005, there is support for this legal proposition. s. 42(2) of the AA 2005 is couched in mandatory terms. It provides that "a reference shall be filed within forty-two days of the publication and receipt of the award, and **shall** identify the question D of law to be determined and state the grounds on which the reference is sought". This provision has been considered mandatory in the judgment in *Chip Lam Seng Berhad v. R1 International Pte Ltd* [2010] 1 LNS 64, where the failure to comply with the 42-day timeline resulted in the application being dismissed.

E (iii) The provisions of s. 37 are quite different. In s. 37, the provision states that an application to set aside the award may be made. This is similar to s. 42(1) which provides that any party may refer a question of law to the High Court. The difference is seen in the F provision stipulating the timeframe to make each of those applications. Section 37(4) provides that an application may not be made after 90 days. Section 42(2) provides that a reference shall be filed within 42 days. Hence there has to be a different approach in considering the two provisions in view of the use of the directory "may" in s. 37 and the mandatory "shall" in s. 42.

G (iv) Where the Act itself imposes a timeframe, the law gives the courts power to extend that time. The Schedule to the Courts of Judicature Act 1964 provides as follows:

H **8. Time**

Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made until after the expiration of the time prescribed: Provided that this provision shall be without I prejudice to any written law relating to limitation.

[11] The learned counsel has taken a candid approach to the problem and cited relevant cases which supports the proposition for extension as well as where it was refused with an admission that there are no Malaysian cases directly on point on s. 37 of AA 2005 even though there are some cases under the Arbitration Act 1952.

[12] Cases relied by the plaintiff are as follows: *Chip Lam Seng Berhad v. R1 International Pte Ltd* [2010] 1 LNS 64; *Percon Corp Sdn Bhd v. Yap Choon Loy* [1998] 3 CLJ 423 CA, *The Government Of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423 FC, *State of Haryana v. Chandra Mani* AIR 1996 SC 1623; *Genuine Paints & Chemicals Co. v. Union of India* 73 [1998] DLT 296; *Union of India v. Popular Construction Co* AIR 2001 SC 4010; *Kalmneft JSC v. Glencore International AG and Another* [2002] 1 All ER; *Downer-Hill Joint Venture v. Government of Fiji* [2005] 1 NZLR 554; *ABC Co v. XYZ Co Ltd* [2003] 3 SLR 546; *Ismail v. The Polish Ocean Lines* [1977] 2 Lloyd's Rep 134; *Bulk Transport Corporation v. Sissy Steamship Co Ltd* [1979] 2 Lloyd's (Rep) 289; *Kwan Lee Construction Co Ltd v. Elevator Parts Engineering Co Ltd* [1997] 1 HKC 97; *Kemira Sdn Bhd v. Weldone (Sarawak) Sdn Bhd* [2007] 1 LNS 532 HC, *Thomas v. Booty, Edwards & Partners* [1964] 1 LNS 207 FC.

[13] I have read the originating summons, affidavits (limiting myself to the issue of delay) and the submissions of the plaintiff. I take the view that the prayer for extension of time ought not be condoned by the court on the facts of the instant case. My reasons, *inter alia*, are as follows:

(i) It is trite that the AA 2005 has *prima facie* accepted the UNCITRAL Model Law and the judicial sentiment here as well as other countries which have adopted the same is inclined towards the jurisprudence relating to "minimum intervention of the court" in matters governed by the Act. I have dealt with this area of jurisprudence in a number of cases, to name a few are as follows: (a) *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83 HC, (b) *Chip Lam Seng Berhad v. R1 International Pte Ltd* [2010] 1 LNS 64 HC, and quite recently in *Sundra Rajoo v. Mohamed Abd Majed & Anor* [2011] 6 CLJ 923 HC. Case No. D-24NCC(ARB)-13 of 2010.

[14] In Singapore and New Zealand, the courts had occasion to consider if art. 34 of the Model Law contemplated an extension of time to set aside the award outside the 90 days timeframe. They concluded it did not. On this issue I agree with the counsel for the plaintiff that the Malaysian courts are not bound by this decision. However, I must say here the decision of foreign courts in relation to common provisions

A or similar provisions as advocated by the Model Law or it's like for good governance of national as well as international issues must be given significant weight in a civilised atmosphere notwithstanding the local laws may have provision to condone delay or case laws may have condoned delay.

B **[15]** I agree with the plaintiff's contention that s. 37(4) of the AA 2005 is directory and not mandatory, in a limited sense only. In the instant case there is a nine-month delay and the grounds stated *prima facie* do not warrant the court to condone delay. The delay here is not "just delay" but I will say inordinate delay as the plaintiff had adequate legal C representation. This is not a case of nominal delay or a situation where a calamity such as tsunami has taken place, for the court to exercise its inherent jurisdiction to condone delay even though limited discretion is vested pursuant to various statute and/or rules of court.

D **[16]** The substantive merit of the application to set aside the award cannot be *sine qua non* to consider an application to condone delay relating to AA 2005 where parties have agreed to arbitration proceedings voluntarily - submitted to the jurisdiction - represented by counsels and have received the award from the tribunal, but failed to file the E application within time.

[17] For reasons stated above, I dismiss encl. 1 with no order as to costs. In respect of encl. 10 I take the view that it has become academic and in consequence it must be struck out with an order that the plaintiff pay the defendants' costs in the sum of RM5,000. The F defendants to pay the allocator fees before the order for costs is extracted. The deputy registrar to issue the allocator certificate.

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